

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE MANUEL AGUIRRE-GANCEDA,

Defendant.

CASE NO. 03-CR-6016-EFS

**ORDER FINDING THAT DEFENDANT
FAILED TO SHOW NEGLIGENCE OR GOOD
CAUSE FOR AN UNTIMELY APPEAL, AND
DISMISSING HIS 28 U.S.C. § 2255
HABEAS PETITION**

On May 18, 2015, Defendant Jose Manuel Aguirre-Ganceda filed a notice of appeal, ECF No. 229, of this Court's April 14, 2015 Order, ECF No. 228, which denied Mr. Aguirre-Ganceda relief under U.S. Sentencing Guidelines Amendment 782 and 18 U.S.C. § 3582. The notice of appeal was not timely filed with the Ninth Circuit. See ECF No. 233; see also Fed. R. App. Proc. 4(b)(1)(A). Nonetheless, because the notice of appeal was filed within 30 days after the expiration of the time to file the notice of appeal, *id.* at Rule 4(b)(4), the Ninth Circuit remanded this matter to the Court to provide Mr. Aguirre-Ganceda with an opportunity to explain why good cause exists to accept the late-filed notice of appeal or to explain that the notice of appeal was filed late due to excusable neglect. On remand, the Court entered an Order permitting Defendant to show good cause or excusable neglect no later than July 7, 2015. ECF No. 234.

1 On July 7, 2015, Mr. Aguirre-Ganceda filed two motions; however,
2 neither shows good cause or excusable neglect for the late-filed notice
3 of appeal. Rather Mr. Aguirre-Ganceda filed a 28 U.S.C. § 2255 habeas
4 petition, ECF Nos. 235 & 236, and a motion for discovery related to the
5 habeas petition, ECF No. 238. The habeas petition does not pertain to
6 or discuss Amendment 782. Instead the habeas petition seeks relief
7 based on the argument that 21 U.S.C. § 851 was unconstitutionally
8 applied to Mr. Aguirre-Ganceda.

9 This is Mr. Aguirre-Ganceda's second § 2255 motion. On January
10 11, 2008, Mr. Aguirre-Ganceda filed his first § 2255 motion. ECF No.
11 181. The Court denied the first § 2255 motion on July 3, 2008, ECF No.
12 187. Mr. Aguirre-Ganceda appealed the Court's denial of his first
13 § 2255 motion, ECF No. 188, and the Ninth Circuit affirmed the district
14 court's decision, ECF No. 203. Section 2255 requires Mr. Aguirre-
15 Ganceda to obtain certification from the Ninth Circuit prior to filing
16 a second § 2255 motion. 28 U.S.C. § 2255(h); Rule 9, 28 U.S.C. foll.
17 § 2255. There is no information before the Court that Mr. Aguirre-
18 Ganceda obtained such certification before filing the instant § 2255
19 motion.

20 Accordingly, Mr. Aguirre-Ganceda's second § 2255 motion is denied
21 for failure to comply with § 2255(h). In addition, the Court finds
22 that Mr. Aguirre-Ganceda failed to establish excusable neglect or good
23 cause for filing his notice of appeal after the deadline set by Federal
24 Rule of Appellate Procedure 4(b)(1)(A).

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For the reasons set forth above, **IT IS HEREBY ORDERED:**

1. No good cause or excusable neglect exists to extend the time period for Mr. Aguirre-Ganceda to file his notice of appeal, ECF No. 229.
2. Mr. Aguirre-Ganceda's second Motion under 28 U.S.C. § 2255, **ECF No. 235**, and related Motion for Discovery, **ECF No. 238**, are **DENIED**.
3. The Clerk's Office is directed to **CLOSE** this file and the related civil file, 4:15-CV-5065-EFS.
4. The Court **DECLINES** to issue a certificate of appealability because this was Mr. Aguirre-Ganceda's second § 2255 motion and he did not previously obtain certification from the Ninth Circuit to file the second § 2255 motion. See 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to Defendant (Reg. No. 52879-079, Federal Correctional Institution Victorville Medium I, P.O. Box 3725, Adelanto, California 92301), counsel, and the Ninth Circuit.

DATED this 15th day of July 2015.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge